In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 78-1874.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,
v.
JOSEPH MEEHAN,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Reply Brief of the Petitioner.

FRANCIS X. BELLOTTI,
Attorney General,
STEPHEN R. DELINSKY,
Assistant Attorney General,
Chief, Criminal Bureau,
BARBARA A. H. SMITH,
Assistant Attorney General,
Chief, Criminal Appellate Section,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240
Attorneys for the Petitioner.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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I. IN THE ABSENCE OF FLAGRANT POLICE MISCONDUCT CONSISTING OF ACTUAL COERCION, APPLICATION OF THE EXCLUSIONARY RULE SHOULD BE RE-EXAMINED.

Respondent relies upon a series of cases[1] in which actual coercion has been found to support his position that the confes-

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[1] *Spano* v. *New York*, 360 U.S. 315 (1959); *Haynes* v. *Washington*, 373 U.S. 503 (1963); *Leyra* v. *Denno*, 347 U.S. 556 (1954); *Lynumn* v. *Illinois*, 372 U.S. 528 (1963).

sion and its fruits must be suppressed. These cases are distinguishable.

Both *Spano* and *Haynes* involved prolonged, isolated interrogation, in which official pressure in the form of specific denial of retained counsel (*Spano*) or refusal to allow suspect to speak with his wife (*Haynes*) were found. Most importantly, in both cases the court noted that the interrogation was not employed in merely trying to solve a crime, but that the police acted with "undeviating intent" to extract a confession. *Spano* at 324; *Haynes* at 511, n.8. In *Leyra*, the defendant was questioned for several days by the police and then by a psychiatrist with "considerable knowledge of hypnosis." The court, in holding such interrogation coercive noted (at 559-560) the effect of such techniques as rendering the suspect dazed and bewildered.[2] Finally, the court in *Lynumn* found that direct threats to the defendant that her welfare benefits would be cut off and her children taken away were coercive. 372 U.S. at 537. However, the only questionable assertion on the part of police in the instant case was the suggestion that "the truth is going to be good defense in this particular case" (A. 36). If this suggestion could be deemed to have induced the confession, the Commonwealth suggests that inquiry should not end.

The respondent states that the controlling test is whether the individual's confession was the product of a rational intellect and a free will; if not, it is inadmissible. However, viewed objectively, it is most difficult to demonstrate how the defendant has been deprived of his ability to choose whether to confess or not. Indeed, even in the most egregious case, (see e.g. *Brown* v. *Mississippi*, 297 U.S. 278 [1936]), the suspect retains the

[2] It is suggested that it is only in such a case wherein hypnotism or truth serum, *Townsend* v. *Sain*, 372 U.S. 293, 307 (1963), is utilized that the "overborne will" test of voluntariness has any meaningful application. For only under such conditions is the individual deprived of the opportunity to make choices.

choice of confessing rather than continuing to sustain brutal abuse. It is therefore suggested that the test should take into account the purpose of excluding "compelled" confessions and, it is submitted, that purpose is two-fold: to deter flagrant and fundamentally unfair police misconduct and to protect the integrity of the trial. In the instant case, the police conduct was not flagrantly or blatantly coercive. If the focus is on the integrity of the trial, then it seems not inappropriate to at least consider whether the interrogational procedures were such as would likely produce a false confession. Here, the inducement, if any, was a suggestion that it is better to tell the truth. It seems far-fetched to conclude that such a statement would induce someone to speak falsely.

It is therefore submitted that the confession in the instant case cannot as a matter of constitutional law be deemed "compelled." Further, it is suggested, the suppression of the confession operates to deny the trier of fact trustworthy evidence.

II. The Fifth Amendment does Not Require Exclusion of Real Evidence Seized Pursuant to a Search Warrant Based in Part on Statements Which are Inadmissible at Trial.

The respondent bases his claim that suppression of derivative evidence is absolutely required by the Fifth Amendment on a series of cases commencing with *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). These cases consider the scope and requirements of the privilege in its natural context:

> The exemption from testimonial compulsion, that is, from disclosure as a witness of evidence against oneself, forced *by any form of legal process*, is universal in American law, though there may be differences as to its

exact scope and limits. *Twining* v. *New Jersey*, 211 U.S. 78, 91 (1908). (Emphasis supplied.)

In such a formal setting, a grand jury proceeding, the court in *Counselman* held that a claim of the privilege asserted against the giving of sworn testimony, compelled under the threat of imprisonment for contempt, could not be overridden by a statutory grant of immunity limited to testimonial use of the compelled statements and not prohibiting derivative use. Without argument or explanation, respondent extends this holding to the materially different context of informal police interrogation. The Commonwealth submits that neither the express terms of the Fifth Amendment privilege[3] nor the policies which this court has recognized as underlying that privilege support or justify such an extension.

The policies or values underlying the privilege, in its traditional context, are comprehensively set forth in *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1965):

> The privilege against self-incrimination "registers an important advance in the development of our liberty — 'one of the great landmarks in man's struggle to make himself civilized.'" *Ullman* v. *United States*, 350 U.S. 422, 426. It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of

[3] See *Brief of the Commonwealth* at 36.

> fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load." 8 Wigmore, Evidence (McNaughton rev. 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States* v. *Grunewald*, 233 F.2d 556, 581-582 (Frank, J. dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." *Quinn* v. *United States*, 349 U.S. 155, 162.

Analysis of these policy considerations reveals scant implication with informal police interrogation.

First, in the context of police interrogation a suspect is not confronted with the "cruel trilemma of self-accusation, perjury or contempt." He is not under oath; the decision to remain silent cannot expose him to contempt nor can a false statement expose him to an additional charge of perjury.

Second, there is no invasion of privacy such as is involved in a grand jury or legislative committee hearing where a witness is required to appear without any prior demonstration of probable cause that he has committed an offense. Here there can be no dispute that there was sufficient evidence-identification of the defendant with the victim and his blood-stained sneakers to constitute probable cause for his arrest. Therefore, in the police interrogation context, the government has sustained its burden of showing "good cause" for "disturbing" an individual.

Third, the concern that compelled testimony may be untrustworthy or "our distrust of self-deprecatory statements"

does not extend to use of derivative evidence for that evidence still must be linked to the defendant by evidence independent of his inadmissible statements. The difference in the application of the privilege to compelled testimony and to derivative evidence has been aptly stated by Judge Friendly:

> Although many citizens devoted to the Bill of Rights may not agree that a "fair state-individual balance" requires the government "to shoulder the entire load" in the investigation as it does in the prosecution of crime, few will deny that one innocent man sent to his death or to a long prison term because of a false confession is one too many. There is thus good reason to impose a higher standard on the police before allowing them to use a confession of murder than a weapon bearing the confessor's fingerprints to which his confession has led; doubtless this is the reason why fruits of a confession "not blatantly coerced" are admitted in England, India, and Ceylon, countries on whose experience the *Miranda* opinion relied. *Benchmarks* (1967) at 282.

It is suggested that not all compulsion renders derivative evidence inadmissible, but only that which is blatant, flagrant, or offensive to some deeply rooted concept of fairness, i.e., practices such as are universally condemned. In the instant case, the only questionable conduct on the part of the police was the suggestion that cooperation and truth would work to the respondent's benefit. However, these remarks were not made in a threatening manner and were far from coercive. See *Fare* v. *Michael C.*, ____ U.S. ____, 61 L.Ed. 2d 197 (1979).

Finally, the value consideration underlying the privilege which is reflected in the policy that "the government in its contest with the individual . . . should shoulder the entire

load" and the "preference for an accusatorial rather than an inquisitorial system" while implicated in permitting use of derivative evidence obtained through police interrogation, are not absolute bars to the use of such evidence. It is well-settled that individuals may be compelled to furnish non-testimonial though possibly incriminating evidence. See, e.g., *Schmerber* v. *California*, 384 U.S. 757 (1966) (blood samples); *Gilbert* v. *California*, 388 U.S. 263 (1967) (handwriting exemplars); *United States* v. *Dionisio*, 410 U.S. 1 (1973) (voice exemplars).

Moreover, our preference for an accusatorial rather than an inquisitorial system reflects, it is suggested, a desire to keep separate the judicial function and the investigative function. It does not create an absolute bar to investigative procedures which could well be labeled inquisitorial, for example, investigative grand juries, under-cover surveillance, and electronic eavesdropping (conducted under proper authorization).

It is therefore submitted that the values underlying the privilege which have led to the principle that no testimony or evidence derived therefrom which is compelled by legal process in the context of judicial or legislative hearings are not applicable to informal police interrogation. The respondent has advanced no basis for extending the *Counselman* holding. Moreover, even in the context of official proceedings, the bar against the use of compelled testimony in further proceedings is not absolute. *United States* v. *Wong*, 431 U.S. 174, 180 (1977) (Fifth Amendment testimonial privilege does not condone perjury.) See also, *United States* v. *Mandujano*, 425 U.S. 564 (1976).

Conclusion.

For the reasons stated in its brief and in this reply brief, the Commonwealth respectfully requests this court to reverse the judgment of the court below.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
STEPHEN R. DELINSKY,
Assistant Attorney General,
Chief, Criminal Bureau,
BARBARA A. H. SMITH,
Assistant Attorney General,
Chief, Criminal Appellate Section,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240